Editor's note: Appealed -- affirmed in part, reversed in part, Civ.No. 84-0157-C (D.N.M. June 1, 1987); aff'd No. 87-2137 (10th Cir. Dec. 24, 1987)

GULF OIL CORP., PITTSBURG & MIDWAY COAL MINING CO.

IBLA 82-416 Decided June 8, 1983

Appeal from decision of the New Mexico State Office, Bureau of Land Management, responding to objections to readjustment of coal leases NM 057348 and NM 057349.

Affirmed in part; set aside and remanded in part.

1. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

   A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the lands.

2. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

   Where notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements for readjustment, and BLM may subsequently provide the specific terms or conditions for readjustment.

3. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

   The Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201-209 (1976), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the amendments.

4.Coal Leases and Permits: Generally

It is proper to include in a readjusted coal lease a provision stating that the lease is subject to the provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. V 1981) (SMCRA). By making the lease subject to the provisions of SMCRA, a violation of that Act is also a violation of the lease, so the remedies available to the United States as lessor are added to its remedies under SMCRA.

5. Coal Leases and Permits: Leases -- Environmental Quality: Generally -- Mineral Leasing Act: Generally

It is proper to include in a readjusted coal lease a provision requiring the lessee to conduct at its own expense a survey and inventory of archaeological and paleontological values prior to approval of a mining plan or any activity that would disturb the surface of the land.

6. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

It is proper to include a provision in a readjusted coal lease which reserves to the United States the right to authorize other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee.

7. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

Under 43 CFR 3451.2, readjustment of a coal lease becomes effective 60 days after the lessee is notified of the readjusted terms, except where the authorized officer has required the lessee to furnish information specified in 43 CFR 3422.3-4 for review by the Attorney General. While compliance may be postponed pending review of a lessee's objections, liability for increased rental or royalty accrues from 60 days after initial notification of the readjusted terms.

APPEARANCES: Donald E. Willson, Esq., Denver, Colorado, Jerome H. Simonds, Esq., and John S. Lopatto III, Esq., Washington, D.C., for appellant; Robert J. Uram, Esq., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Gulf Oil Corporation (Gulf), and its sublessee, the Pittsburg & Midway Mining Company (P&M), have appealed from the December 23, 1981, decision of the New Mexico State Office, Bureau of Land Management (BLM), to the extent that it rejected appellants' objections to the readjustment of coal leases NM 057348 and NM 057349, effective April 1, 1981. Appellants characterize this decision generally as contrary to the law, statutes, and regulations applicable to coal leases; an arbitrary, capricious action, unsupported by facts; an abuse of discretion; and a violation of their rights under the Fifth Amendment of the Constitution.

Before addressing appellants' specific contentions, it is helpful to make some observations on the Department's authority to readjust these leases, which were issued on April 1, 1961. Under section 3(d) of those leases, the United States expressly reserved

> [t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period. Unless the lessee files objections to the proposed terms or a relinquishment of the lease within 30 days after receipt of the notice of proposed terms for a 20-year period, he will be deemed to have agreed to such terms. [Emphasis added.]

The authority for this provision is established by section 7 of the Mineral Lands Leasing Act of February 25, 1920, 30 U.S.C. § 207 (1976).

In Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949, 951 (10th Cir. 1982), the court observed:

> This provides a right to the Government in the nature of an option to make adjustments it considers necessary or to let the opportunity pass. The scope or nature of the changes is not limited and there thus exists a very broad power to make changes considered to be in accordance with the proper administration of the lands. [Emphasis added.]

The power to readjust extends to every term of a lease. The only limitation on this authority is that the Department must notify the lessee of its intent to readjust the lease prior to the end of each 20-year period succeeding the date of the last readjustment, unless otherwise provided by law at the time of the expiration of such period. By accepting a lease containing this provision, the lessee has agreed that the Government, upon timely notice of readjustment, may readjust any term of the lease consistent with the law in effect, not at the time the lease is issued, but when it is ripe for readjustment. Therefore, a lessee has no vested right to continue tenure under original lease conditions; to hold otherwise would totally negate this statutory

reservation of the authority to readjust those terms and conditions. Thus, in the absence of a showing that a readjusted term is inconsistent with any statutory provision in effect on the readjustment date, there can be no merit to any argument that a readjustment decision affects any vested property right. On the contrary, it is the vested right of the United States as lessor and proprietor to readjust the terms.

[1] Consistent with the readjustment authority reserved to the United States by statute, the Department may promulgate regulations prescribing new terms and conditions to be included in coal leases upon readjustment. a decision by BLM to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands. Coastal States Energy Co., 70 IBLA 386 (1983).

[2] Before examining appellants' objections to specific lease provisions, we must first consider their contention that the decision made by BLM was not timely because it did not occur at the end of the 20-year period from the date of lease issuance. As the Field Solicitor points out, however, the notice provided appellant was sufficient. In Coastal States Energy Co., supra at 389-90 (1983), we considered similar objections and held, citing Rosebud Coal Sales Co. v. Andrus, supra at 953, that where notice of intent to readjust the coal leases given to a lessee prior to expiration of the 20-year period, such notice satisfies the statutory requirements for readjustment, and BLM may subsequently provide the specific terms or conditions for readjustment. Thus, the notice mailed appellants on December 29, 1980, provided sufficient notice of the Department's intention to readjust the lease to permit the Department to do so. Although it was not necessary that the Department provide the actual proposed readjustment provisions prior to the 20-year date, the Department did so in this case. Accordingly, we find appellants' arguments concerning timeliness of notice to be without merit.

[3] Keeping the foregoing in mind, we now turn to appellants' specific objections. Appellants' objections extend to almost all the readjusted provisions, but most are directed to those readjusted terms which incorporate many of the amendments found in the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. §§ 201-209 (1976). Appellants characterize the incorporation of these provisions in the readjusted terms as "retrospective" or "retroactive" action. This characterization is incorrect. The disputed conditions were not imposed prior to the timely exercise of the Department's authority to readjust appellants' leases. Appellants' initial acceptance of the leases constitutes their agreement that the Department has the authority to readjust any term of the lease consistent with provisions of law in effect at the time of readjustment. See Coastal States Energy Co., supra at 390-91. As we have noted above, the statute and original lease reserved to the Secretary the right to make readjustment as well as make express provision for Congress to make statutory changes to be reflected in readjusted provisions. Two Solicitors of this Department have addressed the issue whether leases issued prior to August 4, 1976, and subject to readjustment after that date must be readjusted to conform with the Federal Coal Leasing Amendments Act, and both have concluded that the FCLAA governs the terms and conditions that the Department may impose when pre-FCLAA leases are readjusted. Solicitor's Opinion, M-36939, 88 I.D. 1003 (1981); Solicitor's Opinion, M-36920, 87 I.D. 69 (1979). In a number of appeals, this Board has followed these

opinions. E.g., Coastal States Energy Co., supra; Blackhawk Coal Co., 68 IBLA 96 (1982); Lone Star Steel Co., 65 IBLA 147 (1982). The Solicitors' Opinions and Board decisions discussed various lease provisions affected by the statutory amendments and the legal analysis given in those authorities explains why these conditions must be imposed, thereby dispelling the issues raised by appellants in the instant appeal.

Appellants have particular objection to the provision that the lease would be subject to readjustment on April 1, 1991, and each 10-year period thereafter. Appellants point out that when the leases were originally issued, the Act and the leases provided that the leases would only be subject to readjustment at the end of each 20-year period from the date of issuance.

Although lease readjustment is discretionary, if the Secretary readjusts a lease, he must impose certain lease terms and conditions on all pre-FCLAA leases at the time of their readjustment to conform to the provisions of FCLAA. One of these mandatory provisions is the periods at which readjustment may be undertaken. The FCLAA provides, 30 U.S.C. § 207(a) (1976), that each lease shall be issued for a primary term of 20 years and shall be subject to readjustment every 10 years thereafter so long as production continues. Coastal States Energy Co., supra at 394.

We note that the phrase "unless otherwise provided by law" in former section 7 gave the Secretary discretion to readjust lease terms as he deemed proper, unless at the expiration of the 20-year period the law specifically directed that a term be included in the lease. If at the end of the 20-year period the law directed that a lease contain a new provision, section 7 compelled the Secretary to conform the lease to the new provision upon readjustment. The Solicitor has noted:

> Given the strong expressions in the legislative history of the FCLAA of Congress's desire to exact a fair return and ensure that leases are developed and not held for speculative purposes, it is not likely that Congress intended to free the Secretary from any statutory restraints in readjusting pre-FCLAA leases. Since former section 7 no longer exists to govern the exercise of the Secretary's readjustment authority, the only alternative is that the Act as amended by the FCLAA controls. [Emphasis added.]

Solicitor's Opinion, M-36939, supra at 1009. It follows that the readjusted leases properly provide for further readjustment at the end of 10 years.

[4] Appellants have raised several objections in addition to the application of the royalty, rental, and 10-year readjustment provisions of FCLAA. Appellants object to the provision of section 1 in the readjusted lease which states that the lease is subject to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (Supp. V 1981). Appellants point out that the mining which may be performed under the lease is subject to the provisions of SMCRA, but the lease itself is not. Appellants contend that a specific provision in the lease itself is not required because SMCRA is by its own provision applicable to all mining on Federal lands. Appellants err in characterizing this provision as superfluous. By making the lease subject to SMCRA, a violation of SMCRA is made also a violation of the lease, so the remedies available to the United States as lessor

for violation of lease terms are added to remedies under SMCRA. This provision is a prudent one, obviously in the public interest, and therefore appropriate for inclusion in a readjusted coal lease. See 30 U.S.C. § 187 (1976 and Supp. V 1981).

Section 3 of the readjusted lease imposes a requirement for diligent development, defined by the regulation in effect when these leases were readjusted as requiring coal production in paying quantities before June 1, 1986, for pre-FCLAA leases. 43 CFR 3400.0-5(m)(2) (1981). In Coastal States Energy Co., supra at 392, we noted that this period has now been defined as a 10-year period which begins on the effective date of the first lease readjustment. 30 CFR 211.2(a)(14), 47 FR 33180-81 (July 30, 1982). The readjusted leases are remanded to conform section 3 to this new regulation.

The case is also remanded to revise section 12(b)(1) to conform to our ruling in Blackhawk Coal Co., supra at 100-01. 1/

[5] Appellants contend that section 13 concerning cultural resources is not needed. This section authorizes a survey of the leased land by a qualified archaeologist to provide an inventory of any historical, cultural, archaeological, and paleontological values. Subsection (a) provides that the cost of the survey and measures to protect such values discovered as a result of the survey shall be borne by the lessee, and that items and features of historical, cultural, archaeological, or paleontological value shall remain under the jurisdiction of the United States. Subsection (b) provides that if any items of such value are discovered during lease operations, the lessee must notify the mining supervisor. That subsection provides that if the lessee is ordered to take measures to protect any items discovered, the costs shall be borne by the lessor. In Blackhawk Coal Co., supra at 103, we noted that this provision offers no clear justification why the lessee must bear the costs of protecting these values if found during the survey while the Government would bear the cost of measures to protect values discovered during lease operations. We referred to our earlier decisions in General Crude Oil Co., 28 IBLA 214, 83 I.D. 666 (1976), and in Cecil A. Walker, 26 IBLA 71 (1976), and concluded that it would be proper to require the lessee to bear all such expenses, although we did not hold that section 13, by itself, was impermissible. This matter was remanded in Blackhawk because BLM had imposed two additional stipulations covering related subject matter which were not fully consistent with the provisions of section 13. The case was remanded to eliminate the conflicts between section 13 and the stipulations. In the instant case, however, the readjusted leases contain no stipulations inconsistent with section 13 of the lease. In view of the fact that appellant and BLM have requested that we remand the case for redrafting of section 13, we will do so, even if it appears that these requests were based on a misreading of the Board's opinion in Blackhawk. Again, the Board in Blackhawk did not

1/ Therein, we ruled improper a provision in a readjusted coal lease requiring the lessee to conduct operations so as to avoid damage to non-Federal lands in the vicinity of the leased lands and where practical to repair such damage as does occur subject to the approval of the lessor. Judge Burski, in dissent, noted the holding lacked an objective basis in law; it is, however, a binding precedent and is, therefore, followed here.

rule that any single provision relating to cultural resources was objectionable, but only that there were conflicts between them that should be eliminated. On remand, BLM may redraft section 13 to require the lessee to bear all costs of protecting paleontological, archaeological, historical, or cultural values on the leasehold.

[6] Appellants contend that section 14 of the readjusted leases, bearing on Government authorization of other uses and disposition of the leased lands, must also be voided, because other uses would be subject to Gulf's lease rights. As authority for this contention, Gulf cites our decision in Blackhawk Coal Co., supra. Appellants' reliance on Blackhawk is clearly misplaced because section 14 was approved in that decision. We found Blackhawk's objection to that provision invalid because uses authorized by the provision would still be subject to the lessee's rights.

Appellants contend also that section 21 is superfluous, but present no other reason why it should be deleted from the lease. The Solicitor points out that section 21 of the readjusted lease merely explains that breaches of the leases and related mining and exploration plans will be dealt with as provided in the regulations. BLM has included the term for the purpose of helping the lessee to understand its possible liabilities if the lease is not followed. The Solicitor suggests that the information serves a valid purpose, and the provision should be sustained. We agree.

[7] Finally, we will consider appellants' arguments concerning the effective date of the readjustments. The regulations in effect at the time when appellant's leases were ripe for readjustment clearly and unambiguously provided that the readjusted terms shall become effective either 60 days after the lessee is notified of them, or 30 days after the authorized officer transmits the required information to the Attorney General, whichever is later. 43 CFR 3451.2 (1981). This 30-day period applies only when the authorized officer has required the lessee to furnish information specified in 43 CFR 3422.3-4 for review by the Attorney General. Nothing in the record indicates that any such request was made to Gulf, so this 30-day period is not applicable in determining the time when the readjustment became effective. The required notice was issued by BLM on January 29, 1981, and received by Gulf on February 2. In the notice dated December 29, 1980, the State Office had indicated that the readjustment would become effective 60 days after receipt of the notice, so the effective date must be changed to April 3, 1981.

Appellants contend that not until the regulations were amended in 1982 was it provided that "the effective date of the readjusted lease shall not be affected by the filing of objections to any of the readjusted terms and conditions." 43 CFR 3451.2(b) (1982). Although this was not explicitly stated in the prior regulations, they clearly provided that the readjustment would become effective 60 days after receipt of the notice. 43 CFR 3451.2(d) (1981). Contrary to the argument in appellants' statement of reasons, there was no explicit provision in the former regulation that filing objections to the readjustment would postpone the effective date.

Appellants contend that the doctrine of exhaustion of administration remedies requires that the effective date be tolled until issuance of the

decision ruling upon their objections. The exhaustion doctrine, as codified in 5 U.S.C. § 704 (1976), limits judicial review to final agency action and provides that agency action is final for purposes of judicial review unless the agency by rule requires appeal to superior agency authority and provides that the action is inoperative pending appeal. In compliance with this requirement, the decision below provided:

> If an appeal is taken, the existing lease terms and conditions will remain in effect pending the outcome of the appeal. The increased rental and royalties, although not collected, will accrue from the effective date of the readjustments, as shown on the proposed readjusted lease forms, until the issues on appeal are finally determined. If this decision is affirmed as to the issue of the increased rental and royalty rates, the accrued rental and royalty will be payable immediately.

Thus, appellants have suffered no cognizable adverse effect during the period of BLM's review of their objections in this appeal, and their contention is solely directed at the accrual of liability for increased rental and royalty since April 3, 1981. So far, appellants have not been compelled to pay this liability, and if their objections had sufficient merit to be sustained, they would suffer no loss. Appellants make the contention that the filing of their objections to the rental and royalty provisions both requires the Department to forebear its collection of the accrued royalties and further requires the Department to postpone the date on which that liability begins to accrue. The regulations require, however, that the rental and royalty provisions are properly made effective 60 days after receipt of notice of those provisions, and liability for payment begins on such date even if collection is not required until administrative review has been completed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, set aside in part, and remanded.

Franklin D. Arness
Administrative Judge
Alternate Member

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge.